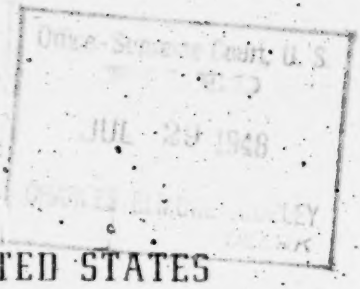

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 182

JOSEPH GIBONEY, HAROLD HACKELL, PAUL MANDALIA,

Appellants,

vs.

EMPIRE STORAGE AND ICE COMPANY

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI

STATEMENT AS TO JURISDICTION

CLIF LANGSDALE,
CLYDE TAYLOR,
Counsel for Appellants.

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IN THE SUPREME COURT OF MISSOURI

EN BANC

APRIL SESSION, 1948

No. 40,099

EMPIRE STORAGE AND ICE COMPANY,
A CORPORATION,
Respondent,

vs.

JOSEPH GIBONEY, HAROLD HACKELL, PAUL MANDALIA, SAM IPPOLITO, HARRY WESTON, WALTER DOWNEY, ROY UTTINGER, JAMES PIKE, TERRILL HENRY, A. J. JENKINS, INDIVIDUALLY, AND AS PRESIDENT OF THE ICE AND COAL DRIVERS AND HANDLERS LOCAL UNION NO. 953,
Appellants

JURISDICTIONAL STATEMENT

This appeal is taken from the Supreme Court of Missouri, en banc, to the Supreme Court of the United States under the provisions of Title 28, sec. 344 U. S. C. A., Judicial Code, sec. 237, as amended, and of Rule 12 and other pertinent Rules of the Supreme Court of the United States.

Judgment Appealed From

This appeal is from a final judgment of the highest Court of the State of Missouri, in which a decision could be had, in a suit, where there was drawn in question the validity of a Statute (to-wit: Section 8301, Volume 18, Revised Statutes, Annotated, Page 516, of the State of Missouri, copy of which is attached), on the ground of said statute being repugnant to the Constitution of the United States, to-wit: Amendment One thereto, and where the decision of the Supreme Court of the State has been in favor of the validity of said Statute.

Timely Appeal

The Supreme Court of Missouri, after entertaining and considering a timely and proper Motion by appellants for a Rehearing, did, on April 12, 1948, overrule such Motion and on said date the judgment herein by the Supreme Court of Missouri did become final. This appeal has been taken and allowed within three months after such judgment so became final.

Decision and Opinion Below

The decision of the State Court has not as yet been officially published in the Missouri Official Reports but appears in 210 Southwestern Reporter (Second Series), Page 55. It also is printed as an Appendix hereto.

How the Constitutional Question Arose in the Case

Plaintiff's petition alleged that the picketing by defendants was illegal because it was in violation of the Missouri Statute prohibiting combinations in restraint of trade or competition. The Supreme Court held (210 S. W. (2d) l. c. 59) that the petition "sufficiently alleges an unlawful combination in restraint of trade such as Section 8301 condemns." Defendants, in the court of first instance, by

Motion and by Answer, such being the first opportunity so to do, prayed dissolution of the temporary injunction and dismissal of the case on the ground that the granting thereof was an abridgment of freedom of speech and of the press protected by Amendment One to the Constitution of the United States and, in substance, that if the statute and general law were construed to render such peaceable picketing unlawful, then said statute and law were unconstitutional and void as in violation of Amendment One. Such constitutional question was kept alive by defendants throughout the entire proceedings culminating in the final judgment in the Supreme Court of Missouri. The latter Court treated the constitutional question as having been properly and timely raised by defendants and proceeded to decide such question adversely to appellants, notwithstanding the proper invocation by defendants of such specific constitutional right. "Under these circumstances we hold the decree does not contravene defendants' right of free speech under the Federal or State Constitutions" (210 S. W. (2d) l. c. 58).

The Constitutional Question Presented on This Appeal Is Substantial

Technically and on the face of the record, the Supreme Court of the United States has jurisdiction because this is an appeal from a final judgment in a suit in the highest court of a State in which a decision in the suit can be had and where there was drawn in question the validity of a statute of the State of Missouri on the ground of its being repugnant to the Constitution of the United States and the decision has been in favor of the validity of such statute (Judicial Code 237 amended).

However, we recognize that that is not enough. There must be a proper showing that said question is substantiated and to that end we submit the following:

The real and substantial constitutional law question in this case is:

How far may a State go, in the exercise of police power, in the abridgment of freedom of speech and of press, on the ground that there is clear and present danger to the public, because the exercise of such freedom in a given case results, to a degree, in restraint of trade or competition; has the State of Missouri, by the statute, transcended such police power and that as a result thereof said statute, as construed, is unconstitutional because it is in conflict with Amendment One to the Constitution of the United States?

The Supreme Court of the United States has held (authorities hereinafter cited) that before freedom of speech can be abridged by State law on the ground of clear and present danger to the public, the substantive evil must be extremely serious and the degree of imminence extremely high. Its presence cannot be inferred, may not rest upon deduction, but must be shown to exist beyond all reasonable doubt. The relation between the clear and present danger and the exercise of the freedom must be inextricable the one from the other. Results from the exercise of the freedom that are incidental, indirect, not substantial, casual or fortuitous, cannot afford a basis for abridgment of the constitutional freedom of speech and of press.

The decision by the State court is not guided by, but does ignore, these fundamental principles of constitutional law. In this the State court fell into manifest error in a decision dealing with fundamental principles of constitutional law. The case presents a substantial Federal question within the jurisdiction of the Supreme Court of the United States.

Importance of the Decision by the State Court

The importance of this question is transcendent particularly with reference to, but not confined to, the fundamental rights of labor. The State Supreme Court did not confine

the scope of its decision to those cases in which the effect of freedom of speech upon restraint of trade or competition was direct, substantial and presented clear and present danger to the public. Included in the scope of the State decision are those cases where the effect upon trade and commerce was indirect, casual and fortuitous.

Pratically every State in the Union has legislation, with remarkable similarity in language, prohibiting pools, trusts, combinations and confederations in restraint of trade and of competition. If freedom of speech, as exemplified in peaceable picketing by labor unions in a labor dispute for a lawful purpose, is to be abridged by local law on the ground that the exercise of such right results in restraint of trade and of competition, then, necessarily, the right of picketing under such circumstances is a dead letter. Particularly is this true where in a given case the effect upon trade and commerce and competition is indirect, casual or fortuitous. So especially is this true where the decision against the constitutional right is not based upon clear and present danger to the public and where such limitation is not considered or even mentioned.

It would be difficult to recall a decision upon fundamental constitutional right of freedom of speech more important to labor and to the public than the one now presented to the Supreme Court.

Authorities in Support of the Submission That There Is Here Involved a Substantial Federal Question Giving Jurisdiction to the Supreme Court of the United States.

I.

PEACEABLE PICKETING, BY EXHIBITION OF BANNERS, DISTRIBUTION OF PAMPHLETS AND OTHER LITERATURE, BY WORD OF MOUTH AND BY OTHER MEANS APPROPRIATE AND EXPEDIENT TO ORDINARY AND USUAL PICKETING BY LABOR UNIONS, IS THE EXERCISE OF FREEDOM OF SPEECH AND OF THE PRESS GUARANTEED AND PROTECTED BY AMENDMENTS I AND FOURTEEN TO THE CONSTITUTION OF THE UNITED STATES.

It is our position that the foregoing provisions of constitutional law have been clearly, expressly and of late years uniformly decided by the Supreme Court of the United States. The leading cases are as follows: *Senn* v. *Tile Layers Union*, (May 24, 1937) 301 U. S. 468, 57 S. Ct. 857, 81 Law Ed. 1229; *Thornhill* v. *Alabama*, (April 22, 1940) 310 U. S. 88, 60 S. Ct. 736, 84 Law Ed. 1093; *Carlson* v. *California*, (April 22, 1940) 310 U. S. 106, 60 S. Ct. 746, 84 Law Ed. 1104; *American Federation* v. *Swing*, (February 10, 1941) 312 U. S. 321, 61 S. Ct. 568, 85 Law Ed. 855; *Milk Wagon Drivers Union* v. *Meadowmoor*, (February 10, 1941) 312 U. S. 287, 61 S. Ct. 522, 85 Law Ed. 836, 132 A. L. R. 1200; *Bakery Drivers Union* v. *Wohl*, (March 30, 1942) 315 U. S. 769, 62 S. Ct. 816, 86 Law Ed. 1178; *Carpenters Union* v. *Ritter's Cafe*, (March 30, 1942) 315 U. S. 722, 62 S. Ct. 807, 86 Law. Ed. 1143; *Cafeteria Union* v. *Angelos*, (November 22, 1943) 320 U. S. 293, 64 S. Ct. 126.

II.

NO RESTRICTION OF ANY CHARACTER CAN BE PLACED UPON FREEDOM OF SPEECH AND OF THE PRESS UNLESS THERE IS CLEAR, PRESENT OR IMMINENT DANGER TO THE PUBLIC IF SUCH RESTRAINT IS NOT MADE. . . .

The permissible area of restriction upon freedom of speech and of the press is extremely narrow, and is well marked. Beyond this area governmental authority cannot go. The so-called clear and present danger to the public rule was pronounced by Mr. Justice Holmes in *Schenck* v. *United States* (1919), 249 U. S. 47, 39 S. Ct. 247, 63 Law Ed. 470, which decision has been repeatedly affirmed by the Supreme Court. The restrictions there pronounced have not been relaxed but on the contrary have been narrowed and confined. For example, in *Bridges* v. *State of California* 314 U. S. 252, 62 S. Ct. 190, the court, reviewing the decisions by the Supreme Court upon this doctrine since the decision in the *Schenck* case states:

> "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." (62 S. Ct., l.c. 194).

The discussion of the clear and present danger rule is perhaps clearest in *Bridges* v. *California* (December 8, 1941), 31 U. S. 252, 62 S. Ct., l.c. 193. The court recites the various conditions to which such rule has been applied by the Supreme Court (l.c. 193). The court then states:

> "'Moreover, the likelihood, however great, that a substantive evil will result cannot alone justify a restriction upon the freedom of speech or of the press. The evil itself must be 'substantial.'" Brandeis, J., concurring in *Whitney* v. *California*, supra, 274 U. S. 374, 47 S. Ct. 647. Legislative preference or beliefs

> cannot transform minor matters of public inconvenience or annoyance into substantive evils of sufficient weight to warrant the curtailment of liberty of expression. *Schneider* v. *State*, 308 U. S. 147, 161, 60 S. Ct. 146, 151." (*Bridges* v. *California*, 62 S. Ct., l.c. 193, 194.)

In *Herndon* v. *Lowry* (April 26, 1937), 301 U. S. 242, 57 S. Ct. 732, the court stated:

> "The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing, even of utterances of a defined character, must find its justification in a reasonable apprehension of danger to organized government. The judgment of the legislature is not unfettered. The limitation upon individual liberty must have appropriate relation to the safety of the state. Legislation which goes beyond this need, violates the principle of the Constitution." (*Herndon* v. *Lowry*, 57 S. Ct. 732).

Clear and present danger to the public of the State of Alabama did not warrant restriction or impairment of the freedom of speech evidenced by picketing in *Thornhill* v. *Alabama*, 310 U. S. 88; nor did such clear and present danger authorize the restriction upon picketing in California in *Carlson* v. *California*, 310 U. S. 106; nor did it justify restrictions upon picketing in the circumstances of *Journeymen Tailors Union* v. *Miller*, 61 S. Ct. 732, nor under the circumstances of *Bakery and Pastry Drivers* v. *Wohl*, 315 U. S. 769, 62 S. Ct. 816; nor did such clear and imminent danger justify impairment of freedom of speech as evidenced by picketing in the circumstances of the *Swing* case and the *Meadowmoor* case.

It is noteworthy that in all of the cases, since the Thornhill case, that have gone to the Supreme Court of the United States wherein it was claimed that clear and present danger or peril to the public justified restriction of freedom of

speech and of the press as applied to peaceable picketing, the restraints in each case have been held to be in violation of the Constitution and void.

III.

THE PRECISE QUESTION THAT REQUIRES DECISION IS, WHETHER PEACEABLE PICKETING IN CONNECTION WITH A LABOR MATTER IN WHICH LABOR HAS A REAL AND SUBSTANTIAL INTEREST BUT WHERE THERE IS NO LABOR DISPUTE BETWEEN THE EMPLOYER PICKETED AND HIS IMMEDIATE EMPLOYEES, PRESENTS SUCH A CLEAR AND PRESENT OR IMMINENT PERIL AND DANGER TO THE PUBLIC THAT THE LEGISLATURE IS WARRANTED IN RESTRAINING FREEDOM OF SPEECH.

In the decision of this question there must be applied the standards and principles as announced by the Supreme Court of the United States in the many foregoing decisions. In this connection we again stress the rule in the *Bridges* case that what finally emerges from the clear and present danger cases is that the substantive evil must be "*extremely serious*" and the degree of imminence "*extremely high*" before restraints of this character can be constitutionally imposed by the legislature. (*Bridges* v. *California*, 62 S. Ct. l.c. 194.)

The proponents of the law must start admitting that generally peaceable picketing is lawful and presents no clear and present evil to the public justifying its prohibition. They must then go forward and establish that peaceable picketing with respect to a labor matter in which labor has a direct interest, but where there is no immediate dispute between the employer and his employees, is so fundamentally different from picketing generally, that there is, by reason of that fact alone, presented a clear and present evil to the public arising therefrom. In this connection it must be kept in mind that the Supreme Court of the United States has said that "the likelihood, however great, that

a substantive evil will result cannot alone justify a restriction of freedom of speech or of the press. The evil itself must be substantial." (*Bridges* v. *California*, 62 S. Ct., l.c. 193.) And also that the court has said "that the substantive evil must be extremely serious and the degree of imminence extremely high before the picketing can be restrained." (*Bridges* v. *California*, 62 S. Ct., l.c. 193, 194.)

See authorities *supra*.

Where Legality of Peaceable Picketing Is in Question, the Primary Purpose and Object of the Union Is of Great Importance.

Allen Bradley v. *Local Union No. 3*, 325 U. S. 797, 65 S. Ct. 1533. *Apex Hosiery Company* v. *Leader*, 310 U. S. 469, l.c. 497, 60 S. Ct. 982, l.c. 994. *United States* v. *Local 807*, 315 U. S. 521, 62 S. Ct. 642.

The Judgment of the State Court Is Not Based on Non-Federal Ground

The judgment of the Missouri Supreme Court is not based upon an independent non-federal ground adequate to support it. The decision squarely meets the constitutional question raised by defendants and decides that the State statute is valid. The decision does not purport to be based upon non-federal ground. The decision of the constitutional question is so interwoven with any question of fact that one cannot be decided without the other.

Whether there is clear and present danger to the public justifying abridgment of speech and of press, is a question of constitutional law for the Supreme Court of the United States and not a question of fact for the Supreme Court of the State.

"When the decision of a question of fact or of local law is so interwoven with the decision of a question of national authority that the one necessarily involves the other, we are not foreclosed by the state's determination of the facts or the local law. Otherwise national authority could be frustrated by local rulings. See Cresswill v. Grand Lodge K. of P., 225 U. S. 246, 56 L. Ed. 1074, 32 S. Ct. 882; Davis v. Wechsler, 263 U. S. 22, 68 L. Ed. 143, 44 S. Ct. 13." United States v. Pink, 315 U. S., l.c. 238, 62 S. Ct., l.c. 569.

In *Jackson County* v. *United States*, 308 U. S. 343, l.c. 350, this Court said:

"Nothing that the state can do will be allowed to destroy the federal right which is to be vindicated."

CLIFF LANGSDALE,
CLYDE TAYLOR,
Attorneys for Appellants.

APPENDIX

IN THE SUPREME COURT OF MISSOURI EN BANC,
JANUARY SESSION, 1948

No. 40,099

EMPIRE STORAGE AND ICE COMPANY, a Corporation,
Respondent,

v.

JOSEPH GIBONEY, HAROLD HACKELL, PAUL MANDALIA, SAM IPPOLITO, HARRY WESTON, WALTER DOWNEY, ROY UTTINGER, JAMES PIKE, TERRILL HENRY, A. J. JENKINS, Individually, and as President of the Ice and Coal Drivers and Handlers Local Union No. 953, *Appellants*

Appeal from the Circuit Court of Jackson County

Plaintiff corporation maintains a cold storage public warehouse where it stores perishable foodstuffs and other perishable merchandise owned by its customers. It also manufactures and sells ice which constitutes from fifteen to twenty per cent of its entire business. Plaintiff's employees are completely unionized by both the C. I. O. and the A. F. of L. The ice which it sells is a union product, not a non-union product. There is no labor dispute of any kind between plaintiff and its employees.

Defendants are members and officers of a labor union, the Ice and Coal Drivers and Handlers Local Union No. 953, which is affiliated with the American Federation of Labor. Its membership is composed of truck drivers for soft drink manufacturers, ice, and coal dealers. The membership also includes individual ice peddlers who operate their own trucks in carrying on their own businesses of selling ice at retail. About eighty per cent of the two hundred ice peddlers doing business in Kansas City are members of the union. The defendants engaged upon a campaign for the purpose of unionizing the remainder. One of the reasons was to establish a minimum wage of $4.00 per day for any helper who may be employed by a peddler. The union has

obtained agreements from all the other manufacturers and distributors of ice in Kansas City under which they are bound not to sell ice to non-union peddlers.

For over twenty years plaintiff has been selling ice at wholesale to individual ice peddlers. The ice peddlers are not employees of plaintiff and never have been. There is no evidence that plaintiff has ever engaged in distributing ice to customers at retail. Sales of ice to peddlers are completed at plaintiff's plant at wholesale rates. Thereafter the peddlers resell the ice at retail to their own customers without being subject to any supervision or control by plaintiff. So far as plaintiff is concerned the peddlers are independent contractors. Only twelve to fifteen peddlers are regular customers of plaintiff.

Defendant Jenkins, President of the Local Union, demanded that plaintiff stop selling ice to non-union peddlers, under the threat he would use means at his disposal to enforce his demand. Plaintiff refused his demand and a picket line was placed at its plant with the result that all deliveries to and from the plant by union drivers were halted. Drivers hauling perishable foodstuffs to plaintiff's plant could not deliver them for storage, and tenants of the storage house could not obtain their foodstuffs stored there. There was no violence. About eighty-five per cent of the plaintiff's storage business was stopped by the picket lines. Defendants insist the only purpose of the picket line was to compel plaintiff to stop selling ice to non-union peddlers, and to obtain such result they had to interfere with plaintiff's business.

Plaintiff brought suit to restrain the picketing on the ground it was pursuant to an unlawful combination in restraint of trade to prevent plaintiff from carrying on its business including the sale of ice, and therefore the picketing was unlawful. Defendants answered they had the right to picket under the freedom of speech provisions of the Federal and State Constitutions.

After a hearing the trial court found defendants were unlawfully conspiring in restraint of trade, the picketing was for an unlawful purpose, and there was no labor dispute between plaintiff and its employees or between plaintiff and

defendants. The court permanently enjoined defendants from picketing plaintiff's plant. Defendants have appealed.

Section 8301, R. S. 1939, Mo. RSA of the article of our statutes entitled "Pools, Trusts, Conspiracies and Discriminations" forbids a combination in restraint of trade and declares it a conspiracy, as follows:

> "Any person who shall create, enter into, become a member of or participate in any pool, trust, agreement, combination, confederation or understanding with any person or persons in restraint of trade or competition in the importation, transportation, manufacture, purchase or sale of any product or commodity in this state, or any article or thing bought or sold whatsoever, shall be deemed and adjudged guilty of a conspiracy in restraint of trade, and shall be punished as provided in this article."

The court en banc has recently held this statute to apply to a situation similar to the one we have here in the case of Rogers *v.* Poteet, — Mo. —, 199 S. W. (2d) 378, and that decision is controlling here and rules this case.

In the Rogers case members of the Milk Drivers and Dairy Employees Local Union combined together to prevent rural milk haulers, independent contractors who were not members of the union, from delivering milk to the dairies' milk processing plants in Jackson County. The court held such combination was "a confederation in restraint of competition in the transportation of fresh fluid milk to all the milk processing plants in that area", pointing out that Section 8301 expressly forbids a combination in restraint of competition in the transportation of commodities.

On the same issues raised here as to the constitutional rights of the defendants to free speech the court said: "In other words, outside of the fundamental guaranties in the Bill of Rights in the Federal and State Constitutions, the question of the legality of such combinations is one of statutory law, not constitutional law." The court held the conspiracy between the union members violated Section 8301 and the common law, and was not protected by the First and Fourteenth Amendments of the Federal Constitu-

tion, and Sections 8, 9 and 10 Article I of the Constitution of Missouri, 1945.

The instant case appears to be even a stronger case than the Rogers case. The plaintiff in that case was an individual hauler whom the union was trying to force into its ranks. But the plaintiff here is a business establishment which is being threatened with the alternative of either ceasing to furnish ice to some of its customers or having its business destroyed through a local transportation combination, substantially denying delivery service to or from its plant in connection with its principal business activity which is storage, not ice selling.

Following the principle laid down in the Rogers case we must hold here that the picketing is unlawful because a combination of union truck drivers involving most of the delivery service transportation in Kansas City comes equally within the condemnation of Section 8301 when it abandons its legitimate sphere of collective bargaining and other properly related dealings with its employers, and seeks to dictate the terms under which an establishment will be either permitted or denied local transportation service.

The defendants have used their local transportation combination improperly to threaten and to produce injury and damage through a boycott of plaintiff's business, and incidentally to injure the business of citizens who are regular customers of its cold storage warehouse, by cutting off supplies to and from its customers. This misuse of their power over local transportation is all the more aggravated by the fact plaintiff's plant is fully unionized and there is no labor dispute between plaintiff and its employees, and there is no labor dispute as the term has been construed by court decisions between plaintiff and defendants, nor even any lawful labor grievance between plaintiff and defendants.

The admitted purpose of defendant's picketing is clearly in violation of Section 8301. Defendant Jenkins testified his union had made agreements with the other ice companies of Kansas City under which the companies agreed not to sell ice to non-union peddlers. By their picketing defendants were attempting to force plaintiff to become a party to such combination. A combination for the purpose of

refusing to sell to a certain person or persons is in direct violation of Section 8301. Our courts have so held in a number of cases. Reisenbichler *v.* Marquette Cement Co., 241 No. 744, 108 S. W. (2d) 343; Heim Brewing Co. *v.* Belinder, 97 Mo. App. 64, 71 S. W. 691; Finck *v.* Schneider Granite Co., 187 No. 244, 86 S. W. 213; State ex rel. *v.* Peoples Ice Co., 246 Mo. 168, 151 S. W. 101; Dietrich *v.* Cape Brewery & Ice Co., 315 Mo. 507, 268 S. W. 38.

In the latter case we said: "Argument is advanced, founded upon the right of a person engaged in a business private in character, to buy from whomsoever he pleases, to sell to whomsoever he will, or to refuse to sell to a particular person. The right does not extend to the allowance of an agreement and concerted action thereunder of such person with others similarly engaged, in the accomplishment of a common design, to destroy the business of another, or to the making of an agreement forbidden by law, and concerted action thereunder, inflicting an injury upon the public. What the defendants could have done severally, by independent action, is essentially different from what they might do collectively, pursuant to an agreement between themselves and by concerted action thereunder." The case of Shaltupsky *v.* Brown Shoe Co., 350 No. 831, 168 S. W. (2d) 1083 is not applicable under the facts or the issues.

Inasmuch as defendants were attempting through its picket line to force plaintiff into a combination which had the concerted purpose of preventing the sale of ice to non-union peddlers, and thus require it to make unlawful discrimination in its sale of ice, it follows that the purpose of the picketing was unlawful.

Picketing for unlawful purposes may properly be enjoined. See Fred Wolferman, Inc. *v.* Root et al., decided today by the court, en banc, and the cases cited therein.

Defendants in this case cite the same decisions of the Supreme Court of the United States in support of their constitutional rights under which they may picket as were cited in the Wolferman case. We refer to that decision for the discussion of these cases and repeat here that they are distinguishable on the facts. We summarized that discus-

sion by stating that none of such cases authorized picketing to induce an employer to do an unlawful act condemned by statute and contrary to public policy, under the constitutional guaranty of freedom of speech.

While the case of Bakery & Pastry Drivers, etc. *v.* Wohl, 315 U. S. 769 dealt with peddlers, described therein as "vendors", of bakery goods it is not apposite here on the issues. The court found no unlawful conduct in that case. In an attempt to unionize the peddlers both the baking companies which supplied the peddlers and customers of the peddlers, in some instances, were picketed. No baking companies were parties to that case. The trial court found that no customers were turned away from the baking companies by reason of the picketing. It also appeared that the baking companies which were then operating delivery routes through employee drivers had notified the unions that at the expiration of their contracts they would no longer employ drivers but would permit the drivers to continue to distribute their baked goods as peddlers. The state court had enjoined the picketing upon the complaint of some of the peddlers on the ground no labor dispute was involved within the meaning of the state statute. Of this the Supreme Court said: "Of course that does not follow: one need not be in a 'labor dispute' as defined by state law to express a grievance in a labor matter by publication unattended by violence, coercion or conduct otherwise unlawful or oppressive."

In Milk Wagon Drivers Union, etc. *v.* Lake Valley Farm Products, Inc., 311 U. S. 91 the union was attempting to organize the peddlers of milk, but as we read the case the picketing which was held lawful was confined to the places of business of the peddlers' customers, and the dairies which supplied the peddlers were not picketed. In that case too, the court observed that increasing use of peddlers to distribute milk caused decreased employment of union milk drivers. It also appears in Milk Wagon Drivers Union, etc. *v.* Meadowmoor Dairies, 312 U. S. 287, where picketing was enjoined because of violence, that the picketing was confined to peddlers' customers.

In Carpenters and Joiners Union, etc. *v.* Ritter's Cafe,

315 U. S. 722, the court upheld the injunction against picketing which a Texas Court had ordered on the ground the picketing constituted a violation of the state anti-trust law. However, the Supreme Court's opinion did not discuss the issue on the anti-trust law, but based its decision on the theory that a State may confine the sphere of communication by picketing to that directly related to the dispute.

The decree in this case forbidding picketing by defendants forbade only the picketing about plaintiff's premises. We affirm the decree. There is nothing in the decree which restrains defendants from informing the public of any labor dispute they may have with the peddlers by any lawful means of dissemination of information, including picketing, wherever the same may be proper. Under these circumstances we hold the decree does not contravene defendants' right of free speech under the Federal or State Constitutions.

Complaint is made that the petition failed to allege an unlawful combination in restraint of trade such as proscribed by Section 8301, and plaintiff failed to prove one. The court found after hearing evidence that defendants had combined in unlawful restraint of trade. We find the proof of such an unlawful combination was sufficient, and as shown above the combination was conceded by defendants as to the violation of the statute in attempting to prevent the sale of ice to non-union peddlers. As to the sufficiency of the petition we find its allegations are somewhat general and well might have been stated in greater particularity. But defendants waived their right to compel this by timely motion. Hamilton *v.* Linn, — Mo. —, 200 S. W. (2d) 69. However, even in its general terms we find the petition sufficiently alleges an unlawful combination in restraint of trade such as Section 8301 condemns.

For the reasons stated, the judgment is *affirmed*.

JAMES M. DOUGLAS,
Presiding Judge.

All concur.